Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1994

Sandra Freeman and Eugene Freeman,

petitioner

vs.

Dr. Lenard R. Simon and Beth Israel Hospital

respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR WRIT OF CERTIORARI

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37pp

QUESTIONS PRESENTED

1) Did the District Court and a Court of Appeals for the First Circuit erred to recognize that the factual allegations in the Plaintiff's complaint have had the constitutional nature, preventing the preclusion from discovery in the civil rights case, dismissed under Rule 12(b)(1) and (6) on March 26, 1993 and affirmed on February 16 1995 by Court of Appeals?

2) Did the District Court and the Court of Appeals erred to recognize that the heavily regulated by the state law Defendants, actin within their representative capacity to deliver health care, caused the injuries and damages depriving Russian-speaking and Russian-born Plaintiff-female under the State promulgated law?

3) Did the District Court and the Court of Appeals erred to recognize that the concealed Plaintiff's castration caused the liberty deprivations, protected by Substantial Due Clause against unwarranted government interference with the freedom of choice to be free of coercive bodily and personhood intrusion, are Constitution's protected?

4) Did the District Court and the Court of Appeals for the First Circuit erred to recognize that the reckless violation of the Plaintiff's rights creates the Article III injuries in fact, which itself infers from the complaint's face and Prima Facie, and precludes the Defendants from unjust victory?

LIST OF PARTIES

Petitioner: Sandra and Eugene Freeman pro se.

Respondents: Dr. Lenard R. Simon, MD, is an individual: BETH ISRAEL HOSPITAL, is a privately owned corporation, and all servants and agents of said corporation who had acted in their representative capacity of BETH ISRAEL HOSPITAL.

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PETITION FOR WRIT OF CERTIORARI

With respect to the decision in *Meyer(*1923) where the Court declared that: "The individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speaks other language, as well as to those born with English tongue., " the Plaintiff argues the recognition of the fundamental rights of which the Plaintiff was deprived by Defendants, namely Dr. Simon, Lenard R., M.D., and Beth Israel Hospital. Defendant Dr. Lenard Simon, MD is a professor of the Harvard Medical School, and Beth Israel Hospital is a teaching hospital of said School. The deprivations, mutilating Plaintiff's bodily integrity had been caused due to the Plaintiff origin - Russian-born, Russian-speaking female Plaintiff with national origin originated by the Plaintiff's parents-father Ukrainian, and mother without the established origin. Previous Plaintiff's place of living was former Soviet Union. But the fact of a Plaintiff's inherited modus, including the inferiority status of a "melting pot" membership traditionally submits the class discriminated by such origin individuals to a correspondent treatment by the State and by a people, inhabited this State territorially and politically. This instant case raises an important question of a Federal law: under what standards may a claim for a coercive infliction of the constitutional and bodily injuries caused by the civil rights deprivations be deemed cognisable under Section 1983?

Plaintiffs's mental pain, anguish and suffering due to the Article 111 injury in fact makes Plaintiff's entitled to recover all of damages, because of emotional distress and damages was inflicted by a physical impact with Defendants. Defendants was authorized and supported by the existed State' laws, practiced in the State of Massachusetts by the health care professionals. Considering the well known fact of existent misconduct, that serves the students and researchers-trainees purpose to upgrade their skills, it is becomes clear to understand the role was played by Dr.Simon and by his affiliates, providing trainees with "material" for such research. As "said of the word "State" as used in the Constitution,: " a state, in ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and originated under a government sanctioned and limited by a written constitution , and established by the consent of the

governed . "(Justice Brennan opinion in *Adickes v. Kress & Co.*(1969) Defining for the purpose of the Section 1983 on support of liability of rights within the private discrimination, the Court said: "Thus a person acts under color of a custom or usage of a State when there is among the people of a State or subdivision of a State a widespread and long-standing practice regarded as prescribed norms for conduct and supported by community sentiment or sanctions, and a person acts in accordance with the custom either from a belief that the norm it prescribe authorize or require his conduct or from a belief that the community at large regards it as authorizing or require his conduct." Defining "permanent and well-settled" official practices under theory of the Equal Protection Clause where private customary violations of constitutional rights on the basis of race were denials of equal protection" the Court stated, that the "Mere state inaction converted customary private discrimination into denial of equal protection, which Congress under paragraphs 1 and 5 had power to remedy...that the Fourteenth Amendment empowers Congress to assert plenary jurisdiction over state affairs, only provides further configuration for the conclusion that "custom" of the people of the State, not custom of state officials".(*Adickes v.Kress*). Under this consideration the liability imposed over the private enterprise for the purpose of the Section 1983 "in effect authorize the federal court to protect rights by the Constitution and secured laws" by invoking any remedy known to the arsenal of the law (*Adickes v. Kress*)

The First Circuit has, therefore, decided federal question in contradiction to this Court instructions and decisions and has departed from the accepted and usual course of judicial proceeding. Because of the potential consequences it had raised in the whole spectrum of irreversible damages of mutilated family unit, Freeman-petitioners cries out for consideration by this Court.

OPINIONS BELOW

The Plaintiffs' civil action was dismissed upon the Defendants' Motion on Rule 12 (b)(1) and (6) lately filed .The District Court Judge Honorable

David Mazzone allowed dismissal on March 26 . On November 30, 1993 Judge David Mazzone issued Memorandum and Order, denying motions for relief under Rules 59(e) and 60 (b)(3). Plaintiffs' appeal to the Court of Appeals for First Circuit was dismissed , affirming the District Court erroneous holdings on February 16, 1995. In addition , Court of Appeals had stated *Blum v. Yaretsky* matters. The opinion sought to be reviewed is the decision of the Court of Appeals for the First Circuit.

STATEMENT OF JURISDICTION

This Court's jurisdiction to review a judgment of the Court of Appeals for the First Circuit affirming the District Court action dismissal under Rule 12(b)(1) and (6), is invoked pursuant to 28 U.S.C. Section 1254 (1).

The case was brought in the District Court of the District of Massachusetts pursuant to Section 1983. After dismissal, the Plaintiffs timely appealed to the First Circuit of Appeals under 28 U.S.C. Sections 1291 and 1292.

The First Circuit affirmed the District Court opinion by judgment dated February 16, 1995. This Petition for Writ of Certiorari is timely filed within
90 days of that decision.

STATUTE INVOLVED

The enforcement of the Plaintiff's civil rights under the Section 1983 of 42 U.S.C. and supported by 28 U.S.C. 1343(3) is an issue in this Writ.

STATEMENT OF THE CASE

The Plaintiff pro se, pleading cause of federal nature action, states that this case involves a dispute to rights of First and Fourteenth Amendments of the Constitution and Paragraph 1 of the Civil Rights Act of 1871, namely Section 1983, and the Plaintiffs' constitutional and federally protected rights not to be deprived of liberty to be free from the bodily injury guaranteed by the Fifth and Fourteenth Amendments and the rights reserved and retained by Ninth, Tenth and Thirteenth Amendments. Injuries in fact, caused by such deprivation creates the grounds for federal question jurisdiction. After the discovery, that the Plaintiff was submitted as a subject to unconsented research and training procedure made in the course of coercive intrusion by in-concert of Defendant's action, the Plaintiff commenced the action in the United States District Court. The action was dismissed on the grounds of the late filed speaking demurrer, stating in support on outside of plaintiff's pleading facts, pertaining to the State litigation and dated of February 23, 1993, as a respond to Plaintiff's Amended Complaint filed on January 12, 1993. On March 26, 1993 the Order of Dismissal was allowed by Mazzone David, Justice, where Justice said: "Allowed, no opposition having been filed. s/A. David Mazzone 3/26/93". The Plaintiff filed the Motion on Rule 55 due to the late Defendant's answer as recommendation of the Clerk. The action was dismissed without the notice to send the opposition.

The Plaintiff filed the Motion on rules 59(e) and 60(b)(3). While two of those motions were pending, the Plaintiff filed the Notice of Appeal, which was dismissed due to its prematurely. On August of 1994 plaintiff again filed a Motion on Rule 59(e), and the Motion was denied. On October the Plaintiff filed the Notice of Appeal. This Appeal was traditionally dismissed in accord with District Court' previous Order, issued by Justice Mazzone, David, and upon *Blum v. Yaretsky* test. This Plaintiff filed this Petition for Writ of Certiorari timely - within 90 days of that decision.

REASONS FOR GRANTING THE WRIT

This Court should grant this petition for writ of certiorari because :

1) This issue of what circumstances give rise to a cognisable claim for deprivations of constitutional and federal liberty caused under the judicial authorization and assistance of a State law, essentially important and should be settled by this Court.

2) The decision below sharply departs from long standing of constitutional democracy principles by arbitrary and improperly dismissing civil rights claims.

3) The decisions expressed by both lower courts conflicts with applicable precedents of this Court and disregards the standards protecting underprivileged ethnically and linguistically disadvantaged Plaintiff, transformed into the laboratory animal.

1) The District Court and Court of Appeals failed to recognize this Court admonition of applying the proper enunciated in Conley test.

Regarding the nature of the Plaintiff's deprivations, vividly painted of the State's "law color", the Plaintiff states that the Court, even being notified in both instances, ignored the Plaintiff's status 'pro se' granting motion to dismiss by the District Court without regard to the Supreme Court indication that a Motion to Dismiss in a Section 1983 is not to be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief "(*Conley v. Gibson*, 355 US 41,78 S.Ct. 99(1957). The Plaintiff states, that the by Equity Rule 7(c), in accord with the federal equity practice that was governed Rules 29 and 33, provides respectively, "...that demurrers and pleas are abolished..." and "exceptions for insufficiency of an answer are abolished. "Rule 7(c) continues the equity practice, and further, provides expressly that exceptions for insufficiency of any pleading shall not be used either. A motion to dismiss for failure to state a claim performs the

same function as the old common law demurrer, thus dismissal under this provision is on the merits and is generally disfavored by courts: *Fayettevile Investors v. Commercial Builders, Inc.*, 936 F.2d 1426 (4th Circuit 1991; *Rothner v. City of Chicago*, 929 F.2d 297 (7th Circuit 1991; *Hall v. City of Santa Barbara*, 813 F.2d 198(9th Circuit 1986: *Sosa v. Colrman*, 646 F.2d 991, (5 Circuit 1981); *De La Cruz v. Tormey*, 582 F.2d 45 (9th Circuit 978) cert. denied, 441 US 965, 99 S.Ct.2416, 60 L.Ed. 2d 1072 (1979). By analogy, the Plaintiff argues that the action of the District Court is similar to an action of the Plaintiff's case, where the Court actually decided that the complaint failed to state a claim (*Johnsrud v. Carter*, 620 F.2d 29 (3rd Circuit 1980) (in action to compel the Federal Government to issue warning of possible radiation hazard, district court erred in dismissing for dismissing for lack of subject matter). Under Conley v. Gibson the Supreme Court holding the First Circuit's opinion of an improper dismissal was expressed by First Circuit seminal cases *Garita Hotel Ltd. v. Ponce Federal Bank*, 956 F.2d 15(1st Circuit 1992 and *DiMella v. Gray Lines of Boston*, Inc., 836 F2d. 718 (1st Circuit 1988.) The Plaintiff extensively argues that the facts alleged by complaint was of such nature which would place defendant's action outside the protection of immunity for the purpose of Section 1983, and therefore dismissal must be denied: (D.*P. Enterprises, Inc. v. Bucks County Comm. College*, 725 F.2d 943 (3rd Circuit 1984); (*Hillard v. Williams*, 465 F.2d 1212 (6th Circuit 1972) cert. denied 409 US 1029, 93 S.Ct.461,34 L.Ed. 2d. 332 (1972); *(Lasher v. Shafer* 460 F.2d 343 (3rd Circuit 1972). Both Court's upholding Defendant's defense, eliminated the resolution of legal dispute within the legal frames of the remedies the Plaintiff entitled to. This is especially true with respect to the fact that the complaint is made by pro se: *Estelle v. Gamle*, 429 US 97, 97 S.Ct. 285, 50 L.Ed. 2d 251 (1976). But the Court of Appeals do not applied the proper enunciated in *Conley* test. Since the test applied in a legion of cases and is most forgiving, many of the courts of appeals are reversals of dismissals erroneously entered by the district court. But this does not take a place in the Plaintiff's event. Plaintiff's case presents clear and indisputable judicial misconduct due to challenged status of Plaintiff pro se by judicial. In support of this statement plaintiff bring very established opinion that a Rule 12(b)(1) alleges that the federal court lacks either federal question or diversity jurisdiction over the action and the motion on Rule 12(b)(6) to dismiss for the failure to state a claim under (6) defense, which presumes the existence of subject matter

jurisdiction and therefore the Court exercising dismissal premised upon both Rule 12(b)(1) and Rule 12(b)(6) is internally inconsistent. Since if court lacks subject matter jurisdiction, it cannot proceed to decide the merits of the action under Rule 12(b)(6). This opinion was expressed in *Bell v. Hood*, 327 US 678(1946) (dismissal for failure to state a claim may be ordered only after finding that jurisdiction over the subject matter is present, since the dismissal based on the validity of claim is an exercise of jurisdiction); *Moir v. Greater Cleveland Transit Authority*, 895 F.2d 266 (6th Circuit 1990) (since defendant prevailed on Rule 12(b)(1) motion it was beyond the power of the court to decide whether the complaint was sufficient to state a cause of action under Rule (b)(6); *Ehm v. National R.R. Passenger Corp.*, 732 F.2d 1250 (5th Circuit) cert. denied, 469 US 982, 105 S.Ct. 387, 83 L.Ed. 2d 322(1984). Plaintiff's preclusion of discovery due to the dismissal should be allowed such as opportunity to demonstrate that jurisdiction exist prior to dismissal of the action: (*Williamson v. Tucker*, 645 F.2d 404 (5th Circuit 1981) cert. denied, 454 US 897, 102 S.Ct. 396, 70 L.Ed.2d. 212), thus under the Plaintiff's assertion in complaint and the Brief of Appeal under federal law a private right of action is not frivolous and due to the Supreme Court holding the claim should not be dismissed for lack of the subject matter: in *Hagans v. Lavine*, 415 US 528, 94 S.Ct. 1372, 39 L.E. 2d 577(1974) the Court applying the analysis of *Bell v. Hood* held that plaintiff's Section 1983 claim was not plainly insubstantial, so federal jurisdiction was present under 28 U.S.C. Paragraph 1343. The fact the Defendant introduced the materials outside of Plaintiff's complaint to raise the objections, attacking the sufficiency of a plaintiff pleading and the District Court was relied upon presented information, expressed in its Order to Dismiss Plaintiff's claim and appears to be a speaking demurrer, abolished by the federal Rule 7(c). As it infers from the statement done by Justice David Mazzone in "Memorandum and Order" dated November 30, 1993 in United States District Court, hat the Defendant has the burden to demonstrate that no claim has been stated is upon the moving, under *Johnsrud* v. *Carter* (3rd Circuit 1980), clearly demonstrates that the District Court erred in dismissing the Plaintiff's claim prior to the trial. Under the language of the District Court, District of Massachusetts in case *Hoover v. Hershman* , 774 F. Supp. 60 (D. Mass. 1991) the motion under the rule 12(b)(1) accompanied by affidavit was treated as a motion for summary judgment. Under the standards of Rule 56 conversion, the motion should not be

granted unless defendant can show that "no reasonable fact finder could, based upon the materials submitted by both sides, find for the plaintiff". This opinion was stated by the District of Columbia Circuit Court reversing the dismissal of district court (*Immunization Products Liability Litigation*, 880 F.2d. 1439, 1442 (D.C. Circuit 1989), holding that the submissions of the parties raised issues that should have been resolved by the trier of fact, but not by the court prior to trial. The Court stated that: "...where a judgment is entered pursuant to Rule 12(b((1) and, like a summary judgment is based in part on matters outside the pleadings, the proper approach is to look to the standard of Rule 56...for guidance". When the summary judgment under Rule 56 may be granted only if there are no material facts in dispute, while under subdivision b(6) all of plaintiff's factual allegations must be presumed to be true. Therefore, it is clearly infers from the entire record of the lover Court's events of mistrials and prejudice against both Plaintiffs, which are entitled to remedial relief due to sustained injury in fact.

2) The Defendants : medical professionals, due to the State's assigned paternalistic mission and acting within the their representative capacity under the judicial authorization, deprived the Plaintiff, ethnic and national origin minority of her federally protected rights under First and Fourteen Amendments.

The Plaintiff, the individual with explicit East-European accent and indisputable origin and ethnicity stereotype based classification of non-English speaking minority bear the immutable stamp being politically powerless segment of society. This race and ethnic origin classification are reviewable under XIV Amendment. Under the test, describing variety of ethnic and national groups in *St. Francis College v. Al-Khazraji* (481 US 604,107 S.Ct. 2022, 95 L. Ed 2d.582(1987) the Plaintiff states that the discrimination infers from the Plaintiff's verbal limitation and ethnicity-based classification. Plaintiff relies upon this Court statement, where the Court said "The 1863 version of the New American Cyclopedia divide the Arabs into number of subsidiary races, representing the Hebrew as of Semitic race, and identified numerous other groups as constituting races, including: Swedes, Norwegians, Germans, Greeks, Finns, Italians, Spanish, Mongolians, Russians, and the like." (Justice White opinion in *St. Francis College v. Al-Khazraji(1987)*

The Plaintiff states that the Court has recognized in Section 1983 that a plaintiff by introducing a sufficient quantum of evidence, material to Plaintiff's deprivation and injury under the Article III jurisdiction can establish a Prima Facie case which will enable him to prevail. A Prima Facie case is not rebuttable simply by denials of the Defendants. In order to prevail, the Defendant must produce the evidence clearly shows that deprivations was occasional by some neutral factor, and not due to the underprivileged ethnic and linguistic minority status, as it appears in the Plaintiff's case. In case of racial discrimination by analogy, the Defendant must introduce other then race neutral factor *(Patton v. Mississippi* (1947) 332 US 463, 92 L.Ed. 76, 68 S.Ct. 184, 1 ALR 2d. 1286). This failure of the District Court and the Court of Appeals for the First Circuit fully neutralize plaintiff's constitutional battle for the Plaintiff's constitutional rights.

The Supreme Court has held that a woman, as part of her right to bodily privacy, has right to be free from assault and bodily injury. Applying the general law principle of informed consent, which is encompass the "**right to be secure in one's person**" as an aspect of the liberty protected of both Fifth and XIV Amendments within the right of bodily privacy upheld by the court in *Scott v. Plante* (1976, CA 5 Miss) 526 F2d. 677), where a person is being subjected to forced treatment. The identical situation infers from the plaintiff's case, where the Defendant's party participants reached the agreement and understanding to deprive the Plaintiff of rights and liberty, within explicit language of the State's law authorization and encouragement, namely Massachusetts General Law Chapter 111 Section 203 and sequential sections, including Chapter 176 Section 7, clause 34-36, as stated giving the privilege to the teaching hospital to be shielded by the immunity in case of unauthorized and unconsented research and teaching procedure, that in Plaintiff's case was presented as a unconsented training, under the pretense of the language of **Chapter 176B:7:**

" No restrictions shall be placed by any such corporation upon its participating physicians, chiropractors, or nurse midwives as to methods of diagnosis or treatment."

This infers from the two part consent in accord with correspondent language of 45 C.F.R. 46.102(e). as follows in accord with 45 C.F.R.46.116, 117, 118 ; and under the National Research Act P.L.93-348,

[H.R.7724], Section 472(a)(1)(ii), (iii) and (iv), as follows in conjunction with "Exceptional Cases" (P.L.93-348), recognizing the "informed consent" per se. (National Research Act, 1974, 93 Congress, II Session, Vol.II, p. 3658). The Plaintiff states that Defendant's status under correspondent Medical Service Corporation Chapter 176B:14 enforce their immunity from any liability for wrongs done. The Plaintiff states that there is no such magic shield presents to protect the Defendants as a Congressional Preemption. Within the frames of (1988) 45 C.F.R. 46.116 (4)(e) it is clearly infers, that: (e) "The informed consent requirement in this regulations are not intended to preempt any applicable federal, state, or local laws which requires additional information to be disclosed in order to informed consent to be legally effective."

With respect to the Supreme Court recognized: "to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an "impossible task" ... Only by stating facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance." (opinion of Justice Clark in *Burton v. Wilmington Parking Authority*(1961), the Plaintiff asserts the argument excluding such unattributable "term as a private medical decision" (*Blum v. Yaretsky*) that was done in accord with carefully delineated state criteria on a highly detailed state form due to very notion of different levels of nursing care in a state money-saving policy, but not in the medical training program(!) running by Dr. Leonard Simon, MD, Director of Department of Gynecological Oncology of the Harvard Medical School - a leading teaching Hospital. This evidence infers from the nature of the relationship between the Harvard Medical School and the BETH ISRAEL CORPORATION-the teaching hospital of said School. Such conglomerate of identities defines an existent enterprise of a medical care provider , shared with a private educational institution. Since *Blum v. Yaretsky*, 457 US 991(1982) 1003, 1005, 1008, 1010-1011, 1016-1026) do not involve an issue of the race-based concern, but only private doctor's adjusting Medicaid benefit of private nursing care home, the principle of private "medical" decision does not justifiable to establish the Defendants abusive role in accord with existing State and Federal law and regulations, as to the contrary of the Defendants misconduct, consistent with congressional intent under the language of 45 C.F.R. 46. 116(a)(1), The responsibility of the Beth Israel Hospital infers from the

action of Institutional Review Board members, presenting themselves in their representative capacity as a Trustees, under the language of Regulations 45 C.F.R. 46. 109.

The Plaintiff states that : (1) existing State law (2) mandates a challenged private action, expressed as a essential public (3) function of health care, (4) providing and delivering as this becomes possible in the Plaintiff's case, where the Defendants' must comply (5) with the State law and existent Cod of Massachusetts Regulations; that is itself important public function assigned (6) to States and that compels the Hospital licensee to comply with its own bylaws and regulations, which is (7) compels, encourages and authorizes by the State law the private enterprise to inflict the injury, where in individual Plaintiff's case the State law (8) immunize the Defendants' private enterprise against liability. In this case, the Defendants' violations become justifiable to apply the Court statement which provides the person with relief in suits for infringement of XIV Amendment rights, where the Federal Court have had typically states: " deemed deprivation that was the object of the conspiracy private persons would not be operating under "color of law" so far as Section 1983 is concerned if acting alone are within that's statute purview if they conspire with parties are to be state action and consummate the constitutional derivation that was the object of the conspiracy. "(*Luker v. Nelson*, 1972, (ND Ill) 341 F. Supp. 111, 121). The Plaintiff argues that in the light of the Court opinion in *Luker v. Nelson*, the position of the Court was consistently similarly expressed, where the Court states that even with out proof of a formal conspiracy known to criminal law, private individuals are subject to Section 1983 when they are willful participants in joint actions with the State or its servants: (*Stambler v. Dilon*, 302 F. Supp. 1250(1969); *Stypmann v. San Francisco* 557 F.2d 1338(1977); *Carrasco v. Klein*, 381 F. Supp, 782 (1974); *Johnson v. Crumsmith*, 224 F. Supp. 22 (1963). And this invasion deprived plaintiff of justifiable right to constitutionally protected zone of intra-familial privacy.

3) The District Court and the Court of Appeals failed to recognize basic principles of constitutional protection, established by the privacy of personhood and bodily integrity in the protected sanctity, securing the realm of intrafamilial affairs, coercively perforated by Defendants.

In *Clay v. Martin* (Cite as 509 F.2d. 109(1975) the United States Court for Second Circuit stated that an action involving medical experimentation on Humans requires a Subject's informed consent, based on full disclosure and free of any form of coercion. In order to demonstrate the direct involvement of the State of Massachusetts in the Defendant's deprivations as a initiative substance, the Plaintiff introduce the proof of direct State's presence in all of elements of State "action", contributing to State position in accord with Court's opinion in *Missouri v. Illinois*, 180 US 208(1901), where the Court has held: **"...[i]f the health and comfort of inhabitants threatened, the State is the proper party to represent and defend them."** In order to assert the doctrine parens patriae the Plaintiff states that the State has the right to allege both: the harm to its citizens and that the matter involved is the type that the State is likely to address through its lawmaking process having the duty to protect its citizens. The Plaintiff argues that the sustained injury was done by the citizens of this State, practicing the custom, based upon the nature of a proprietary interest of State's to provide health care only to selective group of members. This dormant pragmatism based on "in the health and well-being - both physical and economic - of its residents in general" in accord with *Alfred L. Snapp & Son, Inc. v Puerto Rico* (458 US 592, 607(1982). The Courts position of limitation of State's ability to act "with good faith", protecting its own citizenry expressed in early opinions (*Massachusetts v. Mellon*, 262 US 447, 485-486(1923); *South Carolina v. Katzenbach*, 383 US 301, 324(1966) (relying on *Massachusetts v. Mellon* to limit state's ability as parens patriae to sue the federal government.) The Court in *Snapp v. Puerto Rico*(1982) stressed that the State government entity must show both an injury to its citizens and that it is the type of harm "that the State, if it could, would likely attempt to address through its sovereign lawmaking power" (Ib. at 607).. And the Massachusetts General Law Chapter 111 Section 203 up to Section 205 in connection with Chapter 176B Sections 7, 14, and 20(f) demonstrates that the State upheld its own group of citizens to deprive the underprivileged minority. This this factor defines the State of Massachusetts legislative discrimination, based on sovereignty and proprietary interests, delegated to monopolizing health care Defendants. Under the parens patrie , the Plaintiff's 1983 claim indisputably attributed (1) to the State sovereignty, guarantee by Tenth Amendment and {2} by

the structure of integral operations in areas of essential_traditional domain of the government functions. (*Nobel v. Virginia Surface Mining & Reclamation Assn. Inc.*, 4452 US 264, 287, 288(1981) (citation omitted).

The fact that the essentially classic public functions became delegated to private entrepreneurs such as Beth Israel Hospital Corporation, which is require the State Public Commission as a condition of their further regulatory activity in this area, presents the elements of state's administrative body to promulgate regulations, as expressed by Justice Powell, with whom the Chief Justice Renquist and Justice Sandra O'Connor joined, dissenting, defines a state activities and epitomizes the concerns of local, democratic self-governance: "In National League of Cities, we spoke of fire prevention, police protection, and public health ... that affect the every day lives of citizens... We recognized that "it is functions such as this which government created to provide..." (*Garcia v. San Antonio Metropolitan(1985)*. This standard is satisfy the application *of Jackson v. Metropolitan Edison Co.*, 419 US 345, 351 (1974), where the Court stated that: "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the later may be fairly treated as that of the State itself". As the Plaintiff defined of the action promulgated by Institutional Review Board, authorizing the Plaintiff's transformation into Object to the research teaching procedure by the group of Beth Israel Hospital servants may be attributed directly to the State's paternalistic deprivations of entire meaning the "quality of life" within the parens patriae legislative representation . This State deprivation expressed as a collection of a nursing assessment ambulatory surgery dated on May 10, 1989 and May 15, 1989 and performed by the Beth Israel Hospital staff in their representative capacity was presented to Sandra Freeman in the form of two part Questionnaires, defining topics as:

1) **Health Perception Management**
2) **Patient Main Concern**
3) **Self-Perception**
4) **Role-Relationship**
5) **Coping Stress Tolerance**
6) **Cognitive -Perceptual**
7) **Value-Belief**

This method was proposed for assessing actual understanding and how well subject understand the information that have been presented. This test form been proposed for all subjects of the Human research. The government deprivation struck down Sandra Freeman major life pleasurable activity, which is require good health and after such reckless coercive interference make impossible to be engage of sexual intercourse. The definition of the State actors' involvement's clearly presents the Court's definition under *Lugar v. Edmondson Oil Co.*, where this Court said: "A private person who is willful participant in a joint activity with the State is acting within the color of State law" (1982, 102 S. Ct.., 2744, 2756 US ,-,73 L.Ed.2d. 482)

This action, expressed as a State's delegation of its power to a private party, performing a "public function" of the health care provider, in accord with guide-lines of Burton v. Wilmington Public Authority, 365 US 345, 351(1974).

Under the Fourteenth Amendment, which prohibits the States from denying federal constitutional rights and which guarantee due process, applies to acts of states, not to acts of private persons or entities. In context of this Plaintiff brief any term "Action" is correspondent to the definition the "Deprivation" in the order to satisfy scrutiny of judicial interpretation. In *United States v. Price*, 388 US 787, 794, n.7 (1966), the Court stated: "In case under Section 1983, "under color" of law has consistently been treated as the same thing as the "state action" required under the Fourteenth Amendment."

The Court has concluded that the acts of a private party are fairly attributed to the state on certain occasion when the private party acted in concert with state actors. The Court held that "a State normally can be held responsible for private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. "(*Rendell-Baker v. Kohn*, No.80-2102, cited as 457 US 830, 1982, relying on *Flagg Brothers v. Brooks*, 436 US 149(1978); *Jackson v. Metropolitan Edison Co.*, 419 us 245(1974); Moose Lodge No. 107 v. Ervis, 407 US 163(1972) and *Adickes v. Kress Co.*, 398 US 1144(1970). The importance of the term "coercive" become essential due to fraudulent inducement that

the Plaintiff became an Object in experimental surgical procedure without informed consent. Yet, previous decision of the Court held, that where there is a symbiotic relationship between the State and the privately owned enterprise, so that the State and a privately owned enterprise are participants in a joint venture, the actions of the private enterprise may be attributed to the State: "Conduct that is formally "private" may become so entwined with governmental policies or so impregnated with a government character" that it can be regarded as a government action." (*Evans v. Newton*, 382 US 296,399(1966)., A State may not deliberately delegate a duty to privately owned entity. Such duty must be delegated only for the reasons of convenience. Under *Terry v. Adams*, 345 US 461(1953), the State should not be permitted to avoid constitutional requirements simply by delegating its statutory obligations to the private enterprise, according to the fact that the Defendants' private enterprise was and still heavily regulated by the State of Massachusetts. When the States provides a service that the State is required to provide, there is a very close nexus with the State and Defendants' private enterprise under *Smith v. Allwright*, 321 US 649(1944) and *Terry v. Adams*, 345 US 461(1959). The State, by refusing to intervene to protect the Plaintiff, effectively endorsed the Defendant's private enterprise, departures from the federal and constitutional safeguards. Since the medical profession embedded in the health care industry solely to perform the State's statutory duty, a finding of state deprivation might be justified, (*Jackson v. Metropolitan Edison Co.,)*. Under the XIV Amendments the Plaintiff has substantial Due Process rights to be free of constitutionally-based violations. This is exactly the same conditions the Plaintiff was submitted to, which was precludes of informed consent, offending the right of privacy protected by XIV Amendment with the support of State judicial supervision. Citing Professor Lawrens Tribe, in "American Constitutional Law" (ch. 15, p. 1330, 2nd Edition, 1988, Prentice Hall Pub. Co.) where Professor Tribe states, that: " regarded as violation of the self or usurpation of personality it is undeniable that the body constitute the major locus of separation between the individual and the world, and this sense the first object of each person freedom ...can be " (Mr. Lawrence Tribe), the Plaintiff alleges that the zone of substantial Plaintiff's privacy was being invaded in essentially intolerable manner, perforating the integrity of the Plaintiff's personhood and bodily integrity by coercive intrusion. In connection with invidious discrimination on the part of the Defendants' party, that

expressed as a conspiracy to conceal a castration of the Plaintiff, the Plaintiff argue that the procreation was within the zone of the Court's concern to protect a personal autonomy "one of the basic civil rights of man" (*Skinner v. Oklahoma*). This is essential vital formula, maliciously affecting Plaintiffs in the way of the Court interpretation of procreation "as fundamental to the very existence and survival of the race." (*Skinner v. Oklahoma*). Plaintiff argues that the chain of the Defendants' deprivations have made become possible due to the conglomerate of acts and omissions, constituting government's legislative and judicial support to private perpetrators.. Defendants' answer have made become possible due to the " created privilege by the State" *(West v. Atkins, Supreme Court of the United States*, 1988 (487 US 108 S.Ct.2250) . The existence of Massachusetts General Law Annotated Ch.176B:14 and Ch.176B:20(f), combined with the Ch.176B:7 and correspondent clauses of Ch.111 Sections 203 and 204 give the Defendants the immunity and justifiable reason to submit any of its patient to become the subject of research, relying on upon tacit authorization and encouragement expressed by the Chapter 111 Section 203(d) and Chapter 111 Section 204 (d), and Chapter 111 Section 205 (b) (Clause 35-40). In the Defendants' answer, dated September 3, 1992, the Defendant states that: "The Defendant, Beth Israel Hospital says that it is a non-profit charitable institution and therefore immune from liability in this matter." This voluntarily expressed Defendants' statement enforces the Court's definition in support of the State deprivation of Section 1983, under the Fourteenth Amendment and 28 U.S.C.1343(3), where the Court states that: "Every person to be liable under Section 1983 must be acted 'under color of any statute, regulation, custom, or usage.' The custom or usage' must have the force of law by virtue of the persistent practice of State officials." (*Adickes v. Krass Co.*1970). The Plaintiff illustrated the corespondent set of the laws, repugnant to the United States Constitution. Those laws, namely M.G.L.A. 176B:7 ; 176B: 14 and 176B:20(f) created the conditions to the Defendants party to act as they was acted and to be immune from liability as they still immune, under collateral support of existing and material to the Plaintiffs' deprivation laws of Chapter 111 Section 203 and sequential sections, pertinent to the position of a joint participation in the challenged activity. The test of a "symbiotic relationship" was articulated by the Court in *Burton v. Wilmington Parking Authority*, 365 US 715, 81 S.Ct. 856(1961), establishing the government's interdependence and extensive

involvement with the Defendants' private enterprise. (*Hollenbaugh v. Carnegie Free Library*, 545 F.2d. 382, 385(1976), 439 US 1052, 99S. Ct. 734(1978); *Braden v. University of Pittsburgh*, 552 F 2d. 948, 957(1977).. Thus, the establishment of an "inextricably linked relationship renders the government a joint participant in the challenged activity, obviating the need for the Plaintiff to show state involvement in the specific action being challenged" (*Hollenbaugh v. Carnegie Free Library*) And, the "nexus" test, set forth in *Jackson v. Metropolitan Co.*, which should be applied only if the requisite state involvement is not found under the Burton test. (under *Chalfant v. Wilmington Institute*).

The Plaintiff states that the Defendants' deprivations become possible due to essentially important function the Defendants performed. The duty to deliver professional health care is embedded into the explicit domain of the State sovereignty, and had been delegated to private enterprise with such sovereignty. The officials from the Office of Commissioner of the Public Health and the entire Commissioner's cabinet can not and may not perform the surgery or other medical procedure, but their predominant authority to comply with judicial and legislative laws, codes, policies and regulations are defined by the Massachusetts General Laws Annotated, Part I Administration of The Government, Title XIV Public Health: Chapter 111 Definition; Duties of the Department of Public Health; Health Care Facilities; City and Town Boards of Health and Hospitals and particularly within the meaning Chapter 111 Paragraph 5:

POWERS AND DUTIES OF DEPARTMENT

"The Department shall take cognizance of the interest of life, health, comfort and convenience among the citizens of the commonwealth" - the extremely precise definition of parens patriae; and in conjunction with 105 Code of Massachusetts Regulations, namely 130.000: Purpose; 130.002: Authority-105 CMR 130.000 adopted under the authority of MGL c.111 paragraphs 3 and 51 trough 56; and particularly within the meaning of the Chapter 111, section 203(d) ; and Chapter 111 section 204 (d); and Chapter 111 section 205 (b), clause 34-40, where:

"...In no event, however, shall records of treatment maintained pursuant to section seventy of this chapter, or incident reports or records or information which are not necessary to comply with risk management and quality assurance programs established by the board of registration in

medicine be deemed to be proceedings, reports or records of a medical peer review committee under this section;"

The Chapter 111 section 70E: Patients' and residents rights.
Every patient and resident of a facility shall have a right: (clause 39 and sequential)

(h) to refuse to be examined, observed, or treated by students or any other facility staff without jeopardizing access to psychiatric, physiological, or other medical care and attention;

(i) to refuse to serve as a research subject and to refuse any care or examination when the primary purpose is educational or informational rather then therapeutic;

(j) to privacy during medical treatment or other rendering of care within the capacity of the facility;

(k) to prompt life saving treatment in a emergency without discrimination on account of economic status...

(l) to informed consent to the event provided by law;

And every patient or resident of a facility shall be provided by the physician of a facility the right (clause 92 and sequential)

(a) to informed consent to the extent provided by law;

(b) to privacy during medical treatment or other rendering of care within the capacity of the facility

(c) to refused to be examined, observed, or treated by students...;

(d) to refuse to serve as a research subject...;

(e) to prompt saving treatment in an emergency situation without discrimination..."

The plaintiff's introduces the textual evidence as the proof of a intention to suppress the evidence of illegally performed unconsented intrusion into the bodily integrity and personhood, under the State's authorization to obstruct the justice, suppressing the evidence of the coercive infliction of a mutilation, intentionally done to the Plaintiff. Such as it follows from the Chapter III section 205 (b), clause 34-40. This textual evidence, inferring from the face of the law authorizing the Defendants' deprivation of the Plaintiff completely satisfy the test applied in *Adickes v. S.H. Kress & Co.*, where the Court states that:" ...under our prior mere existance of a state policy authorizing, encouraging, or otherwise supporting...discrimination in a particular kind of service is sufficient to render private discrimination in that service state action."

Based upon language of the statute, legislative history, and judicial decisions, the words "under color of a...custom or usage, of a State" in a Section 1983, mean that the "custom or usage must have the force of law by virtue of the persistent practice of state official." This Court defined the existence of the State action in the basis of sufficiently raised discriminatory intent, defining government authority as an "oracle of community values", "setting norms and goals for social conduct". (*Adickes v. S.H.Kress & Co.*) Therefore, the existence of the State's judicial authorization, that is infers from the face of the State's law applicable to the Plaintiff' case presents the elemen: of the the State,s involvment under the color of such law.

4) The district Court and the Court of Appeals explicitly rejected plaintiff's injury caused by wanton and callous Defendants, indifferent to the Plaintiff's severe emotional distress, pain and suffering.

Plaintiff, petitioner, alleges as the one of elements of the deprivations the Plaintiff sustained under Section 1983 are the deprivations of Plaintiff's right to equal protection. In *Jones v. Alfred H. Mayer Co.*, 392 US 409(1969), this Court concluded that Paragraph 2 of the 1866 Civil Rights was intended to be limited to "deprivations perpetrated under color of law", the issue , defining of discriminatory state action in violation of the Fourteenth Amendment: "When the State has commanded a particular result, it has saved to itself the power to determine that result and thereby

"to a significant extent" has "become involved" in it, and, in fact, has removed that decision from the sphere of private choice..." (*Adickes v. Kress & Co.)*
Defendants deprivations was done pursuant to law and this law "gives him aid, comfort or incentive... prescribing, encouraging, authorizing, legitimizing, effectuating, or otherwise supporting" *(Adickes v. Kress & Co.)*. State's expressed sovereignty in the Plaintiff's case presents itself the public function, which is "traditionally the exclusive prerogative of the State" (*Jackson v.Metropolitan Edison Co.,*). It is the fact that the plaintiff's deprivation on the part of both Defendants applied as a essential and traditional power affecting public interest and which is stated by the Massachusetts General Law Annotated Chapter 111 Paragraph 5.

This formula of the State's Power and Duty mirror-like reflects the Supreme Court opinion in the seminal case Missouri v. Illinois, where the Court said: **"[i]f the health and comfort of inhabitants of a State are threatened, the State is the proper party to represent and defend them"** (1901)

The Plaintiff states that the statutory scheme encourage the Defendants party covert or overt to effectuate to:

1) Disregard risk management programs, as a condition of a licensure - M.G.L.A. Chapter 111 Section 203 (d); **2**) To suppress the information as the evidence presented to Justice, to establish the chain of federal and constitutional deprivations by medical professionals, abridging the victims of their right and liberty constitutionally guarantee. **3**) To deny the Plaintiff right to the informed consent, which was creates the grounds for protracted torture. This needless cruel punishment done by private perpetrators, questioned Plaintiff's humanity and personhood, making "a first step to mistreatment and killing" (*Bok, Ethical problems of abortion*, 2 Hastings Center Studies, Jan. 1974, at 33.41). This action clearly establish the conditions of a conspiratorial intent between the Defendants and the State. In this context the Plaintiff rely on *Rogers v. Okin*, where, stated that the: "Considerations should be given as well to the defendant's conduct in relation to the plaintiff's helplessness and dependency. Callous or wanton neglect may warrant a finding a malice, as may reckless

indifference, *Harper v. Cserr*, sup, 544 F.2d at 1125; *Kelly v. Dunne*, 344 F.2d 129, 133 (1st. Cir. 1965) (quoting *Vigoda v. Barton*, 348 Mass. 478, 204 N.E.2d 441(1965). A finding a wanton or reckless behavior may be based in part on a determination that the victim was helpless (*Duchesne v. Shugarman*, 566 f.2d 817, 828 (2d Cir.1977)"

The fact that the language of the MGLA Chapter 111 Section 70E provides the rights for the hospital's patients' to be reserved, but this rights nullified by the oppressing authorization of Chapter 111 Section 203 and sequential. The misconduct, expressed as the State's deprivations on the part of constitutional liberty authorized by the State's judiciary, represent clear direct assault on the entire Constitution of the United States, and on Democracy itself. Chapter 111 Section 204(d) and Chapter 176B:20(f) defines the wrongdoers unlimited power to deprive under the "color of the State law".. The Plaintiff lists those elements with respect to requirements of the "State law action", presented in the Plaintiff's individual case as:

(1) a conglomerate of the state laws in the scheme created by the State, for the purpose of extensive usage and established practice which is (2) mandates a challenged private action, expressed as an (3) essential public function to deliver a health care, in (4) heavily regulated by the State health care industry, where the Defendants (5) must comply with existent Massachusetts General Laws, above stated by the Plaintiff and with actual Cod of Massachusetts Regulations; where itself important public function, assigned (6) to States, under parens patriae, compelling the Public Health Corporations and Hospitals as a providers, to comply with its own by-laws and regulations, which is (7) encourages and authorize the private enterprise to inflict the Plaintiff's injury, stated in individual Plaintiff's case as an deprivations under the Article III, where (8) Defendant's private enterprise immunized by the State's legislative and judicial assistance, support and privileges, against liability for constitutional violations of the First and Fourteenth Amendment's infringement.

CONCLUSION

For the forgoing reasons, petitioners pro se Sandra and Eugene Freeman, respectfully request this Honorable Court to grant their Petition for a Writ of Certiorari to the United States of Appeals for the First Circuit.

Respectfully submitted,
Plaintiff pro se
Sandra and Eugene Freeman
94 Corey Rd., #32
Brookline MA 02146
617-277-7229

APPENDIX

1)The National Research Act P.L. 93-348, [H.R. 7724], Section 472(a)(1)(ii), (iii) and (iv), as follows:

"(ii) training at the Institutes and Administration of individuals to undertakes such research,

"(iii)biomedical and behavioral research at non-Federal public institutions and at nonprofit private institutions, and

"(iv) pre- and post-doctoral training at such public and private institutions of individuals to undertake such research;" and in conjunction with "Exceptional Cases" (P.L. 93-348), recognizing the "informed consent" per se.(National Research Act, 1974, 93 Congress, II Session, Vol.II, p.3658)

2) Medical Service Corporation Chapter 176B:14. Liability of corporation; exemption from insurance laws; tax exemption "Section 14. Every medical service corporation is hereby declared to be a charitable corporation. (No such corporation shall be liable for injuries resulted from negligence or malpractice on the part of any participating physician, participating chiropractor any other part of participating provider of health service under. the laws of the commonwealth to which the subscriber or covered dependent may be entitled under the provision of any workmen's compensation. Every such corporation shall be exempt from all provisions of the insurance laws of the commonwealth , except as otherwise provided

in this chapter. The property of every such corporation shall, except as hereinafter provided be exempt from all state and local taxes."

3) (1988)45 C.F.R.46 .116 (4)(e):

(e) "The informed consent requirement in this regulations are not intended to preempt any applicable federal, state, or local laws which requires additional information to be disclosed in order for informed consent to be legally effective."

4) 45 C.F.R.46.116(a)(1), where is required: "A statement that the study involves research, and explanation of the purpose of the research... and identification of any procedure which are experimental" [46.116(a)(1)].

5) Regulations 45 C.F.R.46.109: "An I.R.B. shall review and have authority to approve, require modification in (to secure Approval), or disapprove all research activities covered by this regulation".

6) POWER AND DUTIES OF DEPARTMENT:
"The Department shall take cognizance of the interest of life , health, comfort, and convenience among the citizens of the commonwealth; shall conduct sanitary investigations and investigations as to the causes of disease, and especially of epidemics, and the sale of food and drugs and adulteration thereof;and shall disseminate such information relating thereto as it considers proper. It shall advise the government concerning the location and other sanitary condition of any public institution. It may produce and distribute immunological, diagnostic and therapeutic agents as it may deem advisable, and may sell such portions of such materials produced in its laboratories as constitute an excess over those required for its use within the commonwealth."

7) The Massachusetts General Laws Annotated, Part I Administration of The Government, Title XIV Public Health: Chapter 111 Definition; Duties of the Department of Public Health; Health Care Facilities; City and Town Boards of Health and Hospitals and particularly within the meaning Chapter 111 Paragraph 5:

8) The Chapter 111, section 203(d) where:

(d) Every licensed hospital shall, as a condition of licensure, be regarded to participate in risk management programs established by the board of registration in medicine pursuant to section five of chapter one hundred and twelve; provided, however, that licensed hospital which participate in pre-existing risk programs may be exempted by regulations of the board from the regulations of this paragraph"

9) The Chapter 111 section 204 (d), where:

(d) A court or administrative body may place reasonable restrictions on the use which made of information obtained thereunder so as to maintains far as necessary or practicable, the confidentiality of such information."

10) The Chapter 111 section 205 (b), clause 34-40, where:

"...In no event, however, shall records of treatment maintained pursuant to section seventy of this chapter,or incident reports or records or information which are not necessary to comply with risk management and quality assurance programs established by the board of registration in medicine be deemed to be proceedings, reports or records of a medical peer review committee under this section;"

11) The Chapter 111 section 70E: Patients' and residents rights.
Every patient and resident of a facility shall have a right: (clause 39 and sequential)

(h) To refuse to be examined, observed, or treated by students or any other facility staff without jeopardizing access to psychiatric, psychological, or other medical care and attention;

(i) To refuse to serve as a research subject and to refuse any care or examination when the primary purpose is educational or informational rather then therapeutic;

(j) To privacy during medical treatment or other rendering of care within the capacity of the facility;

(k) To prompt life saving treatment in a emergency without discrimination on account of economic status...

(l) To informed consent to the event provided by law;

and

Every patient or resident of a facility shall be provided by the physician of a facility the right (clause 92 and sequential)

to informed consent to the extent provided by law;

a) to privacy during medical treatment or other rendering of care within the capacity of the facility

b) to refused to be examined, observed, or treated by students...;

c) to refuse to serve as a research subject...;

d) to prompt life saving treatment in an emergency situation without discrimination.

12) UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
dated November 30, 1993, CA. # 92-12828MA Re.Freeman Et Al v. Beth Israel Hospital and Leonard R. Simon MD

"MEMORANDUM AND ORDER"

"This pro se matter before me on two pending motions. The first is a motion which is treated as a motion for relief under FRCP 59(e). The second is styled as a motion for relief under FRCP 55 and 60(b). The original claim alleged deprivation of various constitutional rights arising out of medical treatment provided by the defendants. These claims were later supplemented by allegations that the defendants fraudulently withheld the name of a treating physician so as to deprive plaintiff of the right to choose treatment. I note that these plaintiffs have filed a medical malpractice action against these same defendants in the Suffolk Superior Court which is still pending. Civil Action No. 92-D917, May 30, 1992. On the motion of the defendants, I dismissed this case on March 26, for reasons stated in the motion and no opposition having been filled by the plaintiffs. On May 12, 1993, I denied plaintiffs' motion for relief under Fed. R. Civ. P. 60(b)(3). I have reviewed the entire record according to the relaxed standard afforded pro se pleadings. My review leads me to

conclude that the pleadings do not state a claim for which relief can be granted and, further that this court lacks subject matter jurisdiction. There is not diversity among the parties and their is no state actor involved which could be a basis for federal question jurisdiction under 42 U.S.C. Section 1983. Motion Denied. SO ORDERED. S/A. David Mazzone. United States District Judge "

13) UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Eugene and Sandra Freeman, Plaintiffs v. Beth Israel Hospital and Dr. Simon MD, Defendants

C.A. No. 92-12828MA

Motion to Dismiss by Defendants'

Motion of Defendant: "Pursuant to Rule 12(b)(1) and (6) of the Federal rules of Civil Procedure, the Defendants, Beth Israel Hospital and Leonard Simon, MD, hereby move this Honorable Court to dismiss this action. As grounds therefore, the Defendants state that this Court lacks subject matter jurisdiction over this matter. The Plaintiff's amended complaint, attached as Exhibit A, fails to state the basis of this Court's jurisdiction over this action. There is no assertion of diversity of citizenship or federal question in the Plaintiff's amended complaint to satisfy 28 U.S.C., section 1331 and 1332. The Defendants further state that the plaintiffs have failed to state a claim upon which relief may be granted. It is the Defendants' position that even if the Plaintiffs' amended complaint satisfies the jurisdictional requirements of the Court, the allegations contained in the amended complaint fail to identify any actionable claim against the Defendants. It should be noted that on or about May 30, 1992, the Plaintiff pro se filed suit, Civil Action No. 92-2917, in Suffolk Superior Court, against Beth Israel Hospital and Leonard R.Simon MD The complaint was amended on or about October 8, 1992. A copy of amended complaint is attached as Exhibit B. The amended complaint contains allegations of medical malpractice against both action is still pending in state Court. For reasons stated above, the Defendants: Beth Israel Hospital and Leonard R. Simon, MD, respectfully request that this action be dismissed. Dated:2/23/93, Defendants, by their attorneys, /signed Ann Simoneau." by Mazzone David, Justice, where Justice said: "Allowed, no opposition have been filed.S/a David Mazzone 3/26/93"

14) Defendant's Letter to the Docket Clerk .
Ms. Maryellen Molloy,
Docket Clerk Justice David Mazzone Court' Room
United States District Court
Re: Freeman v. Simon MD et Al
Dated February 23,1993
CA#92-12828 MA

Dear Ms.Molloy: on February 29,1993 I filed together with a Certificate of Service, a Motion of the Defendants,Beth Israel and Lenard Simon M.D., to dismiss the above-captioned matter with the Civil Clerk's Office of the United States District Court. Enclosed is a copy of the cover letter that was sent to the Court. In the cover letter and the case caption, I inadvertently used the case number that was assigned to a pending Massachusetts State Court action that involves the identical parties named in this Federal Court Action. (See Exhibits A and B that are attached to the Defendants' Motion) ....Sincerely, s/Ann L.Simoneau".

15) UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No.94-2115
February 16, 1995
Freeman pro se, plaintiffs, appellants
v.
Leonard Simon, M.D. and BETH ISRAEL HOSPITAL
Defendants, Appellees
Appeal from the United States District Court for the District of Massachusetts

Per Curium. We affirm for the reasons stated in the district court's November 30, 1993, memorandum and order. At best, plaintiff' pleadings set forth state law tort causes of action over which a federal court lacks jurisdiction absent complete diversity of citizenship, and plaintiffs failed adequately to allege complete diversity. As for plaintiffs' purported Section 1983 claims, neither state licensing nor receipt of public funds would make defendants state actors liable to suit under 42 U.S.C. Section 1983. Blum v. Yaretsky, 457 US 991 (1982). Plaintiffs' claims of conspiracy to deny equal protection were to conclusory to state a cause of action under 42 U.S.C. Section 1985(3). Affirmed.

16) 28 U.S.C. Section 1343 (3)

Civil Rights and elective franchise (a) The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (3) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage secured by Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States".

17) 42 U.S.C. Section 1983

Section 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

18) MGLA 176B:20, MEDICAL SERVICE CORPORATIONS

(f) that nothing contained herein shall prohibit a medical service corporation from disclosing patient information to an account which is self-insured in whole or in part, and administered by such corporation for research to be conducted by the account; provided, however, that no patient shall be the subject of such research without having first been notified by the account in writing of the scope and purpose of the research. Such written notice shall clearly state that the patient will not be a participant in any such research and will not be penalized in any way if the patient elects in writing to be excluded. Any research conducted by an account under this clause shall maintain the confidentiality of all identifiable patient information.

Supreme Court, U.S.
FILED
OCT 24 1995
CLERK

(2)

No. 94 - 1960

In the

Supreme Court of the United States

October Term,1995

Sandra Freeman and Eugene Freeman
Petitioners

v.

DR.LENARD R. SIMON MD and BETH ISRAEL HOSPITAL
Respondent

On Petition For The Rehearing Of An Order Denying A Petition For A Writ Of Cetiorari

PETITIONERS'S BRIEF

Sandra Freeman pro se
Eugene Freeman pro se*

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Brookline MA 02146
Tel.617-734-7111

(* Counsel of Record)

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PETITIONERS' BRIEF Whether a congressionally interposed preclusion to the exercise of constitutional rights may withdraw the protection of the First and Fourteenth Amendments to the Constitution within the zone of intrafamilial privacy of these Petitioners' claim of higher source of Law, than Act of Congress, despite to the fact that sovereignty of the people of the United States predates the sovereignty of Congress.

This is a Petition for the rehearing of an order denying a petition for a writ of a Certiorari. The Order was issued by this Court on October 2 of 1995. The Petition timely was filed with this Court within the terms of the Supreme Court Rules.

The Petitioner Sandra Freeman and petitioner Eugene Freeman still seek relief in order to protect and to vindicate their own interest . The petitioners do allege such a personal stake in the outcome of the controversy so as to assure that concrete adverseness, which sharpens the presentation of issue on upon the Court so largely dependent for illumination difficult constitutional question. The claim and pleadings defines Massachusetts' law statutes, which constitutes arbitrary and capricious state' deprivations under the named laws. Those deprivations, in substance, offensive to the First and Fourteenth Amendments to the Constitution. The Petitioners' notice complaint in the District Court presents a concrete case, admitting of an immediate and definitive determination of the Petitioners' legal rights. The claim is based on

an expressed and proved up event of a brutal invasion into Petitioners' constitutional rights by Respondents. The injury, which Petitioners assert is one which has been judicially recognized as a right, secured by the Constitution. The controversy, presented by Petitioners means the kind of cases the Court traditionally resolve: Article III, Section 2 of United States Constitution. Because of a justifiable cause of action the Petitioners would be entitled to appropriate relief to compensate the wrong was done. The Petitioners raised the issue of the fundamental Substantive Due Process, the Fifth and Fourteenth Amendments which gives standing to challenge the state statute.

This case presents no "political question", at all, even if the Petitioners still seek protection of their own rights: "...the right to relief under equal protection clause is not diminished by the fact that the discrimination relates to political rights.' *(Baker* v. *Carr*,369 U.S. 186,208-210, 82 S.Ct. 691,705-706,7 L.Ed.2d. 663) This Honorable Court has the power to effectuate a remedy as the matter of disregarded established constitutional rights. The Petitioners desperately need resolution in their legal civil and human rights dispute, disclosing the violations by a state law against the Constitution. The appropriate resolution of this controversy would have provide the Petitioners with compensation for constitutional damages they sustained and still suffer. Only this Honorable Court has the power to adjudicate the resolution of this dispute, ensuring the uniform interpretation of federal law.

The Petitioners argue that the judicial orders of both inferior Courts should have fully retroactive effects as to errors, that " are so fundamental that they infect the validity of the underlying judgment itself, or the integrity of the process by which that judgment was obtained"(*Rose v. Lundy,* 455 U.S. 509, 543, 544,n.8 (1982). The Petitioners' civil rights are not for sale, bargain or piecemeal substitution. If the Court denies the Petitioners' rights to establish the justice, then its denies recovery for all damages of blood, pain, fear of the death, humiliation,

both Petitioners, terminated offspring, mental and physical distress, incapacity in the sexual sphere of both Petitioners and all of the disastrous effects upon the Petitioners' family. Thus, denial of adjudication by this Court would uphold the conspiracy: to authorize the servitude, the conspiracy to deprive of liberty. These are acts which are repugnant to the Constitution. It is said that the judicial review of agency determinations of questions of law is to be constitutionally required:" The supremacy of law demands that there shall be an opportunity to have some court decide whether an erroneous rule of law was applied..."*(St. Joseph Stock Yards Co. v. United States,* 298 U.S. 38,84 (1936) (Brandies,J., concuring). It has been the usual limitations of the Bill of Rights and of Article I, Section 9, to apply that external constitutional limitations imposed by due process, on legislation restricting access to the federal courts because of laws designed to hinder the exercise of constitutional right. Therefore, to that degree, they are subject to this Court questioning of its contituonality. Likewise, even those jurisdictional statute unintentional burdens the exercise of such rights warrants strict scrutiny: (*Shapiro* v. *Thompson*(1969) ;(*United States v. Jackson(*1968). The Petitioners argue that their claim disclosing the kind of damages that are not less important than the damages to the protected speech in the sense of suppression or prosecution. The Supreme Court determined that the no forum except a Court can be permitted to impose a valid final restraint on expressional activities, and that this allocation of an authority is demanded by the First Amendment; (*Freedman v. Maryland,*380 U.S. 51,58(1963*); Lo - Ji Sales, Inc. v. New York*, 442 U.S. 319, 325,326(1979). The objection is to any system which allow administrative determination either directly or indirectly to determine finally the scope of application of First Amendment privileges. The Petitioners argue that the right to the protected speech are not less important than the rights pertaining to the bodily integrity, right to the privacy, right and liberty of choice to reject unconsented treatment, considering the nature of injury sustained by Petitioner Sandra Freeman.

The liberty against deprivation without due process of Fourteenth Amendment, which protects the rights found in the Bill of Rights is not less important than the protected right to speech. Congressional activity, penalizing a separately secured Petitioners' constitutional rights, withdraws the protection of federal right within the zone of intrafamilial privacy: Judicial review will not cut unless there is persuasive reason to believe that such was the purpose of Congress. (*Abbott Laboratories* v. *Gardner*, 387 U.S. 136,140,141(1967) This preclusion denies to Petitioners opportunity to litigate their claim arose under the Constitution. The Petitioner argue that the sovereignty of the people of the United States, predates the sovereignty of the Congress and expressed as a source of sovereignty in constitutional claim that entitle said Petitioners to the equal access to the Court. This preclusion is expressed as a congressional discrimination against the claim of higher source of law, than Act of Congress. The state's law and regulations that authorized the conspiracy to deprive of constitutional rights and liberty are the subject to this Honorable Court questioning under Rules of this Court.

CONCLUSION

For the forgoing reasons these Petitioners, Sandra Freeman and Eugene Freeman cries out for reconsideration by this Honorable Court to grant the petition for a writ of Certiorari.

Respectfully submitted to this Honorable Court by Petitioners pro se Sandra Freeman and Eugene Freeman*,

94 Corey Road,#32, Brookline MA 02146,
phone-617-734-7111. (Counsel of Record*)

In the
SUPREME COURT OF THE UNITED STATES

Case No. 94 - 1960
Sandra Freeman and Eugene Freeman
Petitioners
v.
Dr.Lenard Simon R, MD and BETH ISRAEL HOSPITAL
Respondents

Mr. William K. Suter, Esq.
Clerk of the Court
Supreme Court of the United States,
Office of the Clerk
Washington DC 20543

PETITIONERS' CERTIFICATE

Pursuant to Supreme Court Rule 44.2,the Petitioners caused this Certificate and sertify,that :

We, Sandra Freeman and Eugene Freeman pro se, filed this Petition for the Rehearing which is limited to substantial grounds not previosly presented.

Sandra Freeman and Eugene Freeman, Petitioners, hereby sertify that this Petition is presented in good faith and not for delay in order to comply with this Court Rules

Signed under the paines and penalties of the perjury

Dated : 10.24.95

Sandra Freeman

Sandra Freeman

Eugene Freeman*
(Counsel of Record*)

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JUL 18 1995
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No.94 - 1960

In the

Supreme Court of the United States

October Term, 1994

SANDRA FREEMAN and EUGENE FREEMAN
Petitioners
v.
DR. LENARD R. SIMON MD and BETH ISRAEL HOSPITAL
Respondent

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The First Circuit

PETITIONERS 'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

This Honorable Court should grant the petition to resolve the question whether the conspiratorial intent of the Regulations 45 C.F.R. 46 and the State's laws may be a ground to a fraudulent misrepresentation, precluding the constitutional claim.

The petitioners Sandra and Eugene Freeman pro se strongly oppose and express their protest against the Respondents's position to evoke waiver and estoppel to the petitioners's claims under the Constitution in this action. In support of this opposition the petitioners state the grounds, as follows:

It is the petitioners, but not the Respondents sustained the injuries in fact under the Article III. It is the petitioners was precluded

from the discovery in action and substantive due process was grossly abused. And non of the issue presented was fully litigated under the Motion on Rule 12 (b)(6) and (1). It is the petitioners was precluded from the jury judgment and the award of punitive damages for all deprivations they sustained. It is the Respondents' internally conspired enterprise adventure and fraudulent misrepresentation, and concealed the fact and the nature of proposed research and experimentation. It is the petitioners was discriminated under the coercion and the authorization of the State of Massachusetts Laws. And the infliction of an injuries to the First Amendments rights caused irreparable damage, terminated petitioners offspring. It is the Respondents's joint venture, as a matter of law creates the deprivations that was done at the time the alleged injury was committed. It is the Respondents's answer in the State Court indicates specifically fraudulent misrepresentation which was done in manner to be considered as an negligence defense on the part of Respondents's. The immunity pleaded by as a non-profit charitable institution is to preclude liability upon the deprivations under the State law Chapter 176B:14 and the Chapter 231:85 which is infers from the Respondents's answer. This prior position is inconsistent with the Respondents's pleading in the District Court. The Respondents's pleaded the Motion under the Rule 12(b) (1) and (6) which is internally inconsistent. The Petitioners do not changed their position upon discovery of a facts concealed by the Respondents. The petitioners just nominate the discovery of deprivation by the appropriate terms. Respondents and material to the cause of action,: " The cause of action accrues when the plaintiff first knows or has reason to know that he has a cause of action, i.e. when the injury is discovered" (*Gleason v. United States,CA 3d.* 458 F.2d. 171(1972). The petitioners argue that the judicial estoppel arising in event to prevent a party from playing fat and loose with the courts. But not in the event of party, deprived of the constitutional and federal rights after discovery that such rights was recklessly disregarded upon the coercion of the State's

law. Respondents expressly concealed the existence and the nature of a experimental procedure done by unconsented to treatment Dr. Halvorson. Such premeditation which is infers from the concealment of an altered medical records and the evaluation, proposed by the nursing assessment must not be assumed as a negligence, mistake or other innocent reason. And subsequently must not be qualified as an malpractice. Therefore, the Respondents's illegal activity presented in the State's and the Federal Courts as "intentional contradiction is being used as a means of obtaining unfair advantage".(*Scarano v. Central R. Co. of New Jersey*, 203 F. 2d. 510 (1953). The Respondents's requested estoppel must not be afforded second time to conspiring Dr. Lenard R. Simon MD and BETH ISRAEL HOSPITAL.

2. The Court should grant the petition to resolve the question whether the Regulations 45 C.F.R. 46 and the State's law may violate the civil rights and liberty of this petitioners's and to ignore the language of the United States Constitution.

The Respondents ignorance concede that this Court has not resolved any of the issues presented by the petition. That issues is ripe for resolution in this case. The Respondents also rely upon the split in the Circuits on another issue. That issue should likewise be resolved here.

The Respondents do not defend the deprivations on the part of Dr. Simon, MD and the BETH ISRAEL HOSPITAL, done within their representative capacity and authorized by the state's laws. Those laws, however, within the petitioners' findings presents a significant risk to the petitioners's civil rights and liberty, attacking the Constitution of the United States . The Court of Appeals grossly misapplied the standard of review, disregarding petitioners inviolability of a human body and integrity of a personhood within the right of privacy, autonomy and the family values. This values blatantly disregarded by the

policies and the customs under Massachusetts State's laws . Such position ignore the constitutional requirements to enforce statutory guidelines to prevent governmental interference with the right of individual privacy. The Respondents ignore the issue of a mandatory authorization of a state's laws to inflict the petitioners injuries in the sphere of sexual intrafamilial relationship done by Dr. Lenard R. Simon MD and BETH ISRAEL HOSPITAL. The Respondents do not oppose or defend effect of dehumanization of research and experimantal treatment, that petitioner Sandra Freeman was coersively submitted to. The Petitioners argue, that the expansion of the Bill of Rights to restrict State deprivations afforded the Court an opportunity to base Court's decisions voiding State policies on the ground of the First Amendment (*Meyer, Skinner, Griswold*). The Respondents ignorant position explicitly disregards this Honorable Court emphasis upon the privacy rationale in defining and protecting the interest of person "to be let alone". The Petitioners pro se expressly oppose the Respondents's ignorance of Sandra Freeman rights of autonomy and the privacy under *Whalen v Roe*. This Court's decisions make it clear that the right of personal privacy and the guarantee of certain zones of privacy do exist under the Constitution as "fundamental" and "implicit to the concept of ordered liberty" (*Palko v. Connecticut,* 302 US 319, 325 (1937*)*. The Court also makes it clear that the right of personal privacy has extension to activities relating to marriage: procreation in (*Loving v. Virginia*, 388 US 1,11 (1967) and (*Paris Adult Theater v. Slaton*, 413 US 49, 66 n. 13 (1973). The Court said: " The constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a protected intimate relationship. Such protected privacy extends to the doctor's office, the hospital... as otherwise required to safeguard the right of intimacy involved." (*Paris Adult Theater v. Slanton*, 413 U.S. 49,66,n. 13,(1973) As to the contrary, the language of 45 C.F.R. 46 and selected sections of Chapter 111 203(d),204 (d), 205 (b)

and Chapter 176B:20(f) authorize to disregard protected privacy and autonomy. The Court "...established that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nations history and traditions." *(Moor v. City of East Cleveland*, 431 US 494, 503, plurality (1977). The Respondents's reliance upon the both lower Court's standards of review just demonstrates the failure to consider this Court decision, where the Court admonished that "The integrity of the individual's person is a cherished value of our society." (*Shmerberg v. California*, 384 US 757, 771 (1966).

Opposing the Respondents's indifference to the petitioner's suffering, petitioners rely on this Honorable Court's authority. The Respondents's arguments concerning both lower Court's standards of review upheld the governmental invasion that is brutal to human dignity and it shocks the conscience, being a flagrant violation of First and Fourteenth amendments. The Respondents cannot repair State's laws error with new arguments on opposition.

3. The Court should grant the petition to resolve the issue concerning the application of the retroactive effect of *Harder* within the *Letherman* doctrine.

By relying on both lower Court's reasoning and authority the Respondents confirm the split among the Circuits, concerning this Court's announcement in *Harper v. Virginia Department of Taxation*,113 S.Ct.2510(1993). The Court said " when this Court applies a rule of federal law to the parties before it, that Rule is the controlling Rule of Federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule..[we] now prohibit the erection of selective temporal barriers to the application of federal law in

noncriminal cases." This opinion sound that the Federal Courts should not casually impose heightened pleading requirements or otherwise amend the Federal Rules of Civil Procedure in Section 1983 cases. In individual liability cases the reasoning in *Letherman* appears equally applicable to such cases. It reasoned that there was no basis for effectively amending Rule 8(a), commending sharply that such a result "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation"(*Leatherman v. Tarrant County*,) It also pointed out that the fact there were already exceptions to notice pleading provided in the Federal Rules strongly indicated that notice pleading applied to Section 1983 actions : " Explisio unius est exlusio alterius"(*Leatherman v. Tarrant County*). The Court responded that the primary rationale of qualified immunity - the safeguard of government and thus the public, and not the agents of government as such was not transferable to private defendant. The Court said : "[P]rivate parties hold no office requiring them to exercise discretion; nor are they principally concerned enhancing the public good"(*Wyatt v. Cole*,112 S.Ct. at 1833 (1992)

In "Reply due to the burden of proof to demonstrate Federal Court authority to hear Plaintiff's case", case 1:92-CV-12828-MA ,filed in District Court of the United States Clerk's office on December 22,1993, both petitioners cited *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*,113 S.Ct. 1160 ,(1993), where the Court said : " Rule 8(a)(2) requires that a complaint include only " a short and plain statement of the claim showing that the pleader entitled to relief." In *Conley v. Gibson*,355 U.S. 41, 78 S.Ct. 99 2L.Ed. 80(1957) we said in effect that the Rule meant what it said : "[T]he Federal Rules of Civil procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'short and plain statement of the claim that will

give defendant fair notice of what the plaintiffs claim is and the grounds upon which it rests."

The Respondents properly supply petitioner's pleaded notice complaint to the entire Court in order to demonstrate the efficasy of the Court statement, applicable to this case. The Court requirements cannot be ignored and the same principle should be applied to make the issue clear in this Petitioner's case.

CONCLUSION

For the forgoing reasons , the petition for a writ of certiorari should be granted.

Respectfully submitted to this Honorable Court by petitioners pro se Sandra and Eugene Freeman*, 94 Corey Road Unit 32, Brookline MA 02146, tel. 617-277-7229. (Counsel of Record*)